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TO: House Judiciary Committee

FROM: Kansas Judicial Council – Christy Molzen

DATE: March 9, 2016

RE: Judicial Council testimony on SB 361 – Written only

The Judicial Council supports Senate Bill 361, a bill which was originally based on the work product of the Council's Open Records Advisory Committee. The attached report provides some background on the study process that resulted in the drafting of the original version of the bill.

As amended by the Senate Judiciary Committee, SB 361 represents a compromise between the Judicial Council's original proposal and the Attorney General's recommended definition of "public record." The Council supports the amended version of the bill because it continues to accomplish the important goal of preventing public employees and officials from avoiding open records laws by conducting public business or official duties on a private account or device.

**REPORT OF THE JUDICIAL COUNCIL OPEN RECORDS ADVISORY COMMITTEE
ON 2015 SB 306/307 RELATING TO PUBLIC RECORDS AND PRIVATE EMAIL**

DECEMBER 4, 2015

In June 2015, Senator Jeff King asked the Judicial Council to review SB 306/307 relating to the application of the Kansas Open Records Act to emails concerning public business sent by public officials from private email accounts. As part of its review, he asked that the Council look at approaches taken by other states to balance privacy concerns against the need for public disclosure. The Council agreed to undertake the study and formed a new Committee for the task.

COMMITTEE MEMBERSHIP

The members of the Judicial Council Open Records Advisory Committee are:

Senator Molly Baumgardner, Louisburg, Chair; State Senator from the 37th District and Associate Professor of Journalism and Media Communications at Johnson County Community College

Nicole Proulx Aiken, Topeka; Deputy General Counsel for the League of Kansas Municipalities

Athena Andaya, Topeka; Deputy Attorney General

Doug Anstaett, Topeka; Executive Director of the Kansas Press Association

Representative John Barker, Abilene; State Representative from the 70th District, House Judiciary Chair, and Judicial Council member

Kent Cornish, Topeka; President/Executive Director of the Kansas Association of Broadcasters

Rich Eckert, Topeka; Shawnee County Counselor

Frankie Forbes, Overland Park; practicing attorney

Senator Anthony Hensley, Topeka; State Senator from the 19th District

Prof. Mike Kautsch, Lawrence; Professor, Kansas University School of Law

Gayle Larkin, Topeka; Admissions Attorney, Office of the Disciplinary Administrator

Melissa Wangemann, Topeka; General Counsel and Director of Legislative Services for the Kansas Association of Counties

Representative Jim Ward, Wichita; State Representative from the 86th District and practicing attorney

BACKGROUND

In April 2015, the Attorney General issued an opinion concluding that, under current law, emails sent by state employees who use private email accounts and private devices and do not use public resources are not a public agency so those emails are not subject to the Kansas Open Records Act. AG Opinion 2015-10. The Attorney General then sent a letter to Revisor Gordon Self recommending how the legislature might best close that loophole.

Several alternative bills and amendments were introduced late in the 2015 session to close the loophole, including SB 306 and 307, which are identical bills based on the Attorney General's recommendation. Neither of the bills received a hearing, but both remain alive in the Senate Judiciary Committee.

APPROACH

The Open Records Advisory Committee met four times during the late summer and fall of 2015. The Committee considered a number of background materials, including the following:

- Study request letter from Senator King. (Attachment #1)

Legislation:

- 2015 SB 306 (Attachment #2) - because SB 307 is identical to SB 306, it is not included.
- 2015 HB 2300 - an alternative proposal regarding public records and personal electronic devices.
- 2015 HB 2256 - enacted in 2015 to give the attorney general additional power to investigate open records violations.

Kansas materials:

- Materials provided by the Attorney General, including AG opinion 2015-10 (Attachment #3) and a letter from Attorney General Schmidt to Gordon Self, Revisor of Statutes, discussing constitutional issues (Attachment #4).
- AG opinion 2002-1.
- KORA Guidelines published by the Attorney General.
- The Kansas Open Records Act, K.S.A. 45-215 *et seq.*
- The Kansas Government Records Preservation Act, K.S.A. 45-401 *et seq.*
- K.S.A. 21-5920 (tampering with a public record is a class A misdemeanor).
- Kansas State Email Guidelines published by the Kansas Historical Society.
- Executive Order 14-06 adopting a mobile device policy for the executive branch.
- Excerpts from Ted Frederickson, *Letting the Sunshine In*, 33 Kan. L. Rev. 205 (Winter 1985).
- Assorted recent Kansas news articles on the topic of public officials' use of private email to conduct public business.

Federal materials:

- NARA Bulletin 2014-06 providing guidance to federal agencies on maintaining emails that constitute federal records.
- NARA Bulletin 2015-02 providing guidance to federal agencies regarding management of electronic messages.

Information about other states:

- Research on other states' definitions of public records provided by Prof. Kautsch. (Attachment #5)
- Joey Senat, *Whose Business Is It: Is Public Business Conducted on Officials' Personal Electronic Devices Subject to State Open Records Laws?*, 19 Comm. Law & Policy 293 (Summer 2014).
- Steve Zansberg, *Cloud-Based Public Records Pose New Challenges for Access*, 31 Communications Lawyer 12 (Winter 2015).
- Mo. Stat. Rev. § 610.025 regarding electronic transmission of messages relating to public business.

All of the materials listed above are available for review in the Judicial Council office.

The Committee also invited Rodney Blunt, Deputy Chief Information Security Officer for the state, to speak to the Committee about technology-related issues.

DISCUSSION

Definition of Public Record

Early on, the Committee reached consensus that public employees and officers should not be able to avoid open records laws simply by conducting public business or official duties on a private account or device. The Committee agreed that whether a particular email or other record is subject to the open records law should be dependent on whether it is a public record and not solely on its location. The more difficult task was deciding on a definition of public record that would reflect the Committee's consensus.

KORA currently defines public record, in relevant part, as "any recorded information, regardless of form or characteristics, which is made, maintained or kept by or is in the possession of any public agency" K.S.A. 45-217(g)(1). Public agency includes the state, any political or taxing subdivision of the state, any office, officer, agency or instrumentality of the state or a political or taxing subdivision, or any other entity receiving or expending and supported in whole or in part by public funds. K.S.A. 45-217(f)(1). The definition of public agency does not, however, include public employees.

SB 306/307 would amend the definition of public record, in relevant part, as follows: "Public record' means any recorded information, regardless of form or characteristics or location, which is made, maintained or kept by or is in the possession of: (A) Any public agency . . . or (B) any officer or employee of a public agency pursuant to the officer's or employee's official duties and which is related

to the functions, activities, programs or operations of the public agency.” The bill would also strike “officer” from the definition of “public agency.”

In addition to the definition of “public record” proposed by SB 306/307, the Committee reviewed definitions of the term from a number of other states. It found that many states define public records with reference to content rather than location and, of those states, most define public records as being “in connection with the transaction of public business” or use similar language. Attachment #5 contains a list of different states’ approaches to defining the term, “public record.”

The Committee found that the current KORA definition of public record is at least partly location dependent, and to be technology neutral, it would be preferable if public record were defined with reference to content rather than location. Kansas law on records preservation also defines records in terms of their content. K.S.A. 45-402(d) defines “government records” as any document, data or information “regardless of physical form or characteristics, storage media or condition of use, made or received by an agency in pursuance of law or in connection with the transaction of official business or bearing upon the official activities and functions of any governmental agency.”

A majority of the Committee agreed that public record should be defined as “any recorded information, regardless of form ~~or~~, characteristics or location, which is made, maintained or kept by or is in the possession of: (A) Any public agency; or (B) any officer or employee of a public agency in connection with the transaction of public or official business or bearing upon the public or official activities and functions of any public agency.”

This proposed definition varies somewhat from the definition contained in SB 306/307, which was recommended by the Attorney General based on his interpretation of U.S. Supreme Court case law dealing with public employee free speech rights. The Attorney General’s recommendation adopted language approved by the U.S. Supreme Court in *Garcetti v. Ceballos*, 547 U.S. 410, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006), which the AG believes is carefully crafted to include a constitutionally satisfactory limitation for its application to privately held records of any officer or employee of a public agency and, therefore, would pass constitutional muster. See Attachment # 4 for a fuller description of the Attorney General’s position. The Attorney General has not expressed an opinion on the constitutionality of the definition proposed by the majority of the Committee. However, it is the Office of the Attorney General’s position that the safer course of action is to use language that has survived scrutiny by the U.S. Supreme Court.

A majority of the Committee, however, believes that its proposed definition of public record is preferable for a number of reasons. First, some Committee members questioned whether *Garcetti*, which involved a public employee who was disciplined for what he argued was protected speech, was applicable in the context of open records law. Second, a majority believes that the Committee’s proposed language is preferable because it is important to link the definition of public record under KORA to the definition of government record under the Kansas records preservation act. Third, similar definitions have been used in a number of other states without legal challenge, and case law from those states may prove helpful to the courts in interpreting the new language. Finally, the Committee’s

proposed language, which uses the disjunctive “or” test, will result in a broader category of documents that will be subject to KORA.

Other Amendments Contained in SB 306/307

The Committee also reviewed other amendments to the KORA definitions of “public agency” and “public record” contained in SB 306/307. For example, SB 306/307 would strike “officer” from the term “public agency.” The AG recommended this change in order to separate flesh and blood individuals like officers and employees who have first amendment free speech rights from government entities such as public agencies that do not. See page 8 of Attachment #4.

Several Committee members had concerns about striking the term “officer” from the definition of “public agency” because it might exempt officers from numerous other KORA provisions setting out agency responsibilities. Also, the change could unsettle years of existing Kansas case law and AG opinions interpreting the definition of public agency. While the Committee ultimately agreed to leave the amendment as it stands in SB 306/307, the Committee does believe that the Revisor’s office should conduct a review of KORA, including all of the statutory references to both “officer” and “public agency,” to ensure that the change does not create unintended consequences.

SB 306/307 would also relocate the exclusions for judges and part-time officers and employees currently found in K.S.A. 45-217(f)(2)(B) and (C) to subsection (g)(2). Under current law, judges and part-time officers and employees are excluded from the definition of “public agency,” while under SB 306/307, they would be excluded from the definition of “public record.” Again, the AG recommended this change to separate living individuals (officers and employees) from non-living entities (public agencies). See page 9 of Attachment #4.

Committee members were concerned that the effect of relocating the exclusions for judges and part-time officers and employees might be to exempt the records of these individuals altogether, which was not the original intent of these provisions. The exclusions were originally intended to prevent judges and part-time officers and employees from being personally responsible for responding to KORA requests or keeping reasonable office hours for doing so; they were not intended to exclude these individuals’ records from KORA. See Ted Frederickson, *Letting the Sunshine In*, 33 Kan. L. Rev. 205, 218-220 (Winter 1985).

Accordingly, the Committee agreed to recommend leaving the exclusion for judges at its original location in K.S.A. 45-217(f)(2)(B). The Committee reached a different decision, however, as to the exclusion for part-time officers and employees.

The exclusion for part-time officers and employees, also known as the 35-hour rule, excludes from the definition of public agency an officer or employee who works for a government entity that does not provide an office which is open to the public at least 35 hours a week. See K.S.A. 45-217(f)(2)(C). Again, this exclusion was apparently intended to apply only to the part-time officers and employees personally and not to the governmental entity they serve. See Ted Frederickson, *Letting the Sunshine In*, 33 Kan. L. Rev. 205, 219-220 (Winter 1985).

Several Committee members noted that the 35-hour rule is difficult to understand and difficult to train others to understand. Based on feedback from city and county clerks, the Committee found that the rule does not seem to be serving any current purpose since, as a practical matter, some representative of the governmental entity must still respond to the open records request. Also, since the term "officer" is stricken from the definition of "public agency" under SB 306/307 (and the term "employee" was never included in the definition of "public agency"), it seems redundant to have a second exclusion for part-time officers and employees contained in that statute. Accordingly, the Committee recommends repealing the 35-hour rule by striking it from the statute altogether.

Privacy Concerns

The Committee acknowledged the privacy concerns related to accessing email and electronic messages that constitute public records. For example, if a public officer or employee sends an email that constitutes a public record from a private account or device, who may access that account or device to retrieve the content? Do the entire contents of the account or device become open to public scrutiny? This concern is of special importance to a public officer or employee who is also a doctor, lawyer or other professional subject to confidentiality requirements.

To aid its consideration of this issue, the Committee sought more information about the current process used by the state to retrieve emails or electronic messages that might constitute public records. The Committee invited Rodney Blunt, Deputy Chief Information Security Officer for the state, to speak on this issue.

Mr. Blunt explained to the Committee that emails sent to or from state agency accounts are stored on state servers, where they can be searched and monitored as needed. How long emails are retained on the servers depends on the content of the email and on each agency's retention schedule, which varies from agency to agency. If a KORA request is made for emails stored on state servers, the agency determines whether the records being requested are subject to the open records act or fall under an exemption to disclosure, and it is up to the requester to go to court if they disagree with the agency's decision.

According to Mr. Blunt, emails sent to or from external private accounts (such as Yahoo or Gmail) are not stored on state servers even if they are sent from a government PC or device. The state has no ability to access a private email account absent a court order. An agency might ask an employee to turn over private emails relating to public business, but the agency would not have the power to compel the employee to do so without a court order. Mr. Blunt stated that some agencies, as a matter of policy, prohibit employees from accessing private email accounts via a government PC and may block employees from doing so.

Mr. Blunt also explained how cell phone text messages are different from email in that they are retained by the service provider for a set length of time and not on a state server. When a state agency provides a mobile device to an officer or employee, it can exert some security controls over that device, though the level of security and cost varies. At a minimum, employees can be required to use a passcode before being allowed to connect remotely with state networks. Agencies that want more

security can create a separate “container” on a mobile device for public business, and all information in that container is maintained on the state server.

A common question Mr. Blunt receives relates to state subsidies for employees who provide their own mobile device. Employees frequently ask whether the state will have access to search their entire device, and the answer is no, unless the employee voluntarily allows access. However, to receive the subsidy, employees may be required to sign a waiver stating that they will allow an inspection of the device for sensitive information when they leave state employment and that, if they don’t allow the inspection, the state may remotely wipe the entire device.

Based on the information provided by Mr. Blunt, the Committee concluded that expanding the definition of public record to clearly include emails or text messages about public business will not unduly affect public employees’ or officers’ privacy rights. The state may already access and monitor any email sent from a state account, but it has no ability or right to access a private account. Federal law provides privacy protections for electronic communications. See, generally, the Electronic Communications Privacy Act (ECPA), 18 U.S.C. Section 2510 *et seq.* At most, a public employee or officer might be asked to turn over emails from a private account that constitute public records, but no one else could access that employee or officer’s private email account without a court order. If a court order were issued pursuant to an enforcement action under K.S.A. 45-222, the court could conduct an *in camera* review to determine which emails constitute public records that are subject to KORA. See K.S.A. 45-222(b).

Furthermore, there are existing KORA exceptions that would prevent information of a private or privileged nature from being made public. As defined under KORA, “public record” does not include “records which are owned by a private person or entity and are not related to functions, activities, programs or operations funded by public funds.” K.S.A. 45-217(g)(2). Also, KORA does not require disclosure of records that are “privileged under the rules of evidence, unless the holder of the privilege consents to the disclosure” or of public records containing “information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy.” K.S.A. 45-221(a)(2) and (a)(30).

As to the concern expressed by some legislators about the privacy of their personal email accounts, the Committee noted that records of legislators are already exempt under KORA. See K.S.A. 45-217(g)(2).

Small Government Entities and Training

In drafting amendments to the KORA definition of public record, the Committee considered how small government entities at the city and county level might be affected. Based on input from cities and counties, the Committee found that small government entities are already accustomed to responding to KORA requests; however, they will need to train their officers and employees about how to handle email and text messages that may constitute public records.

The Committee believes that training public officers and employees at every level of government about the requirements of KORA and the records retention requirements of the Kansas records preservation act is essential to ensure consistent interpretation and compliance across the state. The Committee noted that a bill enacted this year, 2015 HB 2256, authorizes the Attorney General, subject to appropriations, to provide and coordinate KORA training throughout the state, including an online training program, and to consult and coordinate with appropriate organizations to provide training.

Penalty/Remedy

The Committee also reviewed the existing penalties and remedies for violations of KORA. The Committee reviewed 2015 HB 2256, which gave the Attorney General increased powers to investigate open records act violations and created a graduated system of enforcement, beginning with a consent order, a finding of violation and, finally, court action. The new law also gave the Attorney General authority to impose a fine that did not exist prior to the passage of this law. The Committee also reviewed K.S.A. 45-223, which authorizes the imposition of a civil penalty of not more than \$500 against an agency that knowingly violates KORA or intentionally fails to furnish information as required by KORA.

The Committee was particularly interested in the possible penalties and remedies for the situation of a public employee who refused to turn over private emails that constituted public records. The Committee noted that both HB 2256 and K.S.A. 45-223 apply only to state agencies and not individual employees.

The Committee noted that K.S.A. 21-5920 makes tampering with a public record a class A misdemeanor. This statute could be applied to an agency employee who destroyed a public record. The only other apparent option against an individual employee who refused to turn over public records would be for a court to hold the employee in contempt.

After reviewing the above provisions, the Committee agreed that current penalty and remedy provisions are adequate, and it made no recommendation as to any new penalty or remedy provision.

Other Possible Amendments

The Committee discussed several options for possible amendments to current law. One possibility would be to prohibit the use of private email accounts for conducting public business. Another would be to require that any email dealing with public business be forwarded to the agency. Both of these options could prove expensive, especially for small government entities such as townships and drainage districts that don't currently provide government email accounts to their officers or employees.

The Committee specifically reviewed a Missouri statute that requires any member of a governmental body who transmits a message relating to public business by electronic means to also "concurrently transmit that message to either the member's public office computer or the custodian of

records in the same format.” See Mo. Stat. Rev. § 610.025. While the Committee agreed that adopting a similar provision in Kansas might be a good idea, the Committee did not have sufficient time to research the topic further, especially as to how such a requirement might apply to text messages, or to draft a provision that would mesh with KORA. However, the Committee believes this is a topic that deserves future attention by the legislature.

Even absent a statutory provision prohibiting the use of private email accounts for conducting public business or requiring emails about public business to be forwarded to the agency, these are procedures that individual agencies might consider implementing as part of their personnel policies.

RECOMMENDATION

A majority of the Committee recommends the balloon amendments to SB 306/307 attached on the next page. The main purpose of the balloon amendments is to amend the definition of “public record” to ensure that public officers and employees who conduct public business or official duties on a private account or device would remain subject to KORA.

SENATE BILL No. 306

By Senator Baumgardner

5-14

Kansas Judicial Council
Open Records Advisory Committee
November 13, 2015
Proposed Amendments

1 AN ACT concerning the open records act; relating to definitions; public
2 agency and public record; amending K.S.A. 2014 Supp. 45-217 and
3 repealing the existing section.
4

5 *Be it enacted by the Legislature of the State of Kansas:*

6 Section 1. K.S.A. 2014 Supp. 45-217 is hereby amended to read as
7 follows: 45-217. As used in the open records act, unless the context
8 otherwise requires:

9 (a) "Business day" means any day other than a Saturday, Sunday or
10 day designated as a holiday by the congress of the United States, by the
11 legislature or governor of this state or by the respective political
12 subdivision of this state.

13 (b) "Clearly unwarranted invasion of personal privacy" means
14 revealing information that would be highly offensive to a reasonable
15 person, including information that may pose a risk to a person or property
16 and is not of legitimate concern to the public.

17 (c) "Criminal investigation records" means records of an
18 investigatory agency or criminal justice agency as defined by K.S.A. 22-
19 4701, and amendments thereto, compiled in the process of preventing,
20 detecting or investigating violations of criminal law, but does not include
21 police blotter entries, court records, rosters of inmates of jails or other
22 correctional or detention facilities or records pertaining to violations of
23 any traffic law other than vehicular homicide as defined by K.S.A. 21-
24 3405, prior to its repeal, or K.S.A. 2014 Supp. 21-5406, and amendments
25 thereto.

26 (d) "Custodian" means the official custodian or any person designated
27 by the official custodian to carry out the duties of custodian of this act.

28 (e) "Official custodian" means any officer or employee of a public
29 agency who is responsible for the maintenance of public records,
30 regardless of whether such records are in the officer's or employee's actual
31 personal custody and control.

32 (f) (1) "Public agency" means the state or any political or taxing
33 subdivision of the state or any office, ~~office~~, agency or instrumentality
34 thereof, or any other entity receiving or expending and supported in whole
35 or in part by the public funds appropriated by the state or by public funds
36 of any political or taxing subdivision of the state.

(2) "Public agency" shall not include: _____

(A) Any

~~(A) any entity solely by reason of payment from public funds for property, goods or services of such entity; (B) any municipal judge, judge of the district court, judge of the court of appeals or justice of the supreme court; or (C) any officer or employee of the state or political or taxing subdivision of the state if the state or political or taxing subdivision does not provide the officer or employee with an office which is open to the public at least 35 hours a week.~~

; or (B) any municipal judge, judge of the district court, judge of the court of appeals or justice of the supreme court

(E) (1) "Public record" means any recorded information, regardless of form or, characteristics or location, which is made, maintained or kept by or is in the possession of:

(A) Any public agency including, but not limited to, an agreement in settlement of litigation involving the Kansas public employees retirement system and the investment of moneys of the fund; or

in connection with the transaction of public or official business or bearing upon the public or official activities and functions of any public agency

(B) any officer or employee of a public agency pursuant to the officer's or employee's official duties and which is related to the functions activities programs or operations of the public agency

"Public record" shall include, but not be limited to, an agreement in settlement of litigation involving the Kansas public employees retirement system and the investment of moneys of the fund.

(2) "Public record" shall not include:

(A) Records which are owned by a private person or entity and are not related to functions, activities, programs or operations funded by public funds;

(3)

(B) records which are made, maintained or kept by an individual who is a member of the legislature or of the governing body of any political or taxing subdivision of the state; _____

or

(C) Records of any municipal judge, judge of the district court, judge of the court of appeals or justice of the supreme court;

~~(D) records of any officer or employee of the state or political or taxing subdivision of the state if the state or political or taxing subdivision does not provide the officer or employee with an office which is open to the public at least 35 hours a week; or~~

(3) ~~Public record~~ shall not include records of employers related to the employer's individually identifiable contributions made on behalf of employees for workers compensation, social security, unemployment insurance or retirement. The provisions of this subsection shall not apply to records of employers of lump-sum payments for contributions as described in this subsection paid for any group, division or section of an agency.

(h) "Undercover agent" means an employee of a public agency responsible for criminal law enforcement who is engaged in the detection or investigation of violations of criminal law in a capacity where such employee's identity or employment by the public agency is secret.

Sec. 2. K.S.A. 2014 Supp. 45-217 is hereby repealed.

Sec. 3. This act shall take effect and be in force from and after its

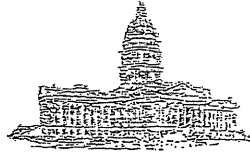
SB 306

3

1 publication in the statute book.

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State of Kansas
Senate Vice President



JEFF KING
SENATOR, FIFTEENTH DISTRICT

May 26, 2015

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Nancy J. Strouse
Executive Director
Kansas Judicial Council
301 S.W. Tenth Ave., Ste. 140
Topeka, KS 66612

Dear Nancy:

I respectfully ask the Kansas Judicial Council to review Senate Bill 16 and Senate Bills 306-307 from the 2015 session of the Kansas Legislature. SB16 concerns the award of attorney fees when a judgment is rendered against an insurance company on a policy written to insure property against loss by fire, tornado, lightning, or hail. SB 16 would narrow the scope of such an attorney fee award to apply only to judgments in cases involving first-party policy claims. I would hope that any Judicial Council review would concern not only current law and SB16, but an proposal in this arena that the Council feels would best allocate attorney fees in these types of litigation.

* SB306-307 relate to the application of the Kansas Open Records Act on emails about public business sent by public officials from their private email accounts. Both of these bills are similar to a proposal made by the Kansas Attorney General following his formal opinion on this issue. This is an issue impacting all 50 states and the federal government. In that vein, I hope the Judicial Council could analyze approaches taken by other states and provide insight on their preferred method of balancing privacy concerns versus the need for public disclosure.

I would appreciate receiving the Council's response prior to the 2016 session. Should you require additional information or have any questions, please do not hesitate to contact me at 620.714.1881. Thank you for your consideration.

Sincerely,

Senator Jeff King
Chairman, Senate Judiciary Committee

Session of 2015

SENATE BILL No. 306

By Senator Baumgardner

5-14

1 AN ACT concerning the open records act; relating to definitions; public
2 agency and public record; amending K.S.A. 2014 Supp. 45-217 and
3 repealing the existing section.

4
5 *Be it enacted by the Legislature of the State of Kansas:*

6 Section 1. K.S.A. 2014 Supp. 45-217 is hereby amended to read as
7 follows: 45-217. As used in the open records act, unless the context
8 otherwise requires:

9 (a) "Business day" means any day other than a Saturday, Sunday or
10 day designated as a holiday by the congress of the United States, by the
11 legislature or governor of this state or by the respective political
12 subdivision of this state.

13 (b) "Clearly unwarranted invasion of personal privacy" means
14 revealing information that would be highly offensive to a reasonable
15 person, including information that may pose a risk to a person or property
16 and is not of legitimate concern to the public.

17 (c) "Criminal investigation records" means records of an
18 investigatory agency or criminal justice agency as defined by K.S.A. 22-
19 4701, and amendments thereto, compiled in the process of preventing,
20 detecting or investigating violations of criminal law, but does not include
21 police blotter entries, court records, rosters of inmates of jails or other
22 correctional or detention facilities or records pertaining to violations of
23 any traffic law other than vehicular homicide as defined by K.S.A. 21-
24 3405, prior to its repeal, or K.S.A. 2014 Supp. 21-5406, and amendments
25 thereto.

26 (d) "Custodian" means the official custodian or any person designated
27 by the official custodian to carry out the duties of custodian of this act.

28 (e) "Official custodian" means any officer or employee of a public
29 agency who is responsible for the maintenance of public records,
30 regardless of whether such records are in the officer's or employee's actual
31 personal custody and control.

32 (f) (1) "Public agency" means the state or any political or taxing
33 subdivision of the state or any office, ~~officer,~~ agency or instrumentality
34 thereof, or any other entity receiving or expending and supported in whole
35 or in part by the public funds appropriated by the state or by public funds
36 of any political or taxing subdivision of the state.

1 (2) "Public agency" shall not include:

2 ~~(A) any entity solely by reason of payment from public funds for~~
3 ~~property, goods or services of such entity; (B) any municipal judge, judge~~
4 ~~of the district court, judge of the court of appeals or justice of the supreme~~
5 ~~court; or (C) any officer or employee of the state or political or taxing~~
6 ~~subdivision of the state if the state or political or taxing subdivision does~~
7 ~~not provide the officer or employee with an office which is open to the~~
8 ~~public at least 35 hours a week.~~

9 (g) (1) "Public record" means any recorded information, regardless of
10 form ~~or~~, characteristics *or location*, which is made, maintained or kept by
11 or is in the possession of:

12 (A) Any public agency including, but not limited to, an agreement in
13 settlement of litigation involving the Kansas public employees retirement
14 system and the investment of moneys of the fund; *or*

15 (B) *any officer or employee of a public agency pursuant to the*
16 *officer's or employee's official duties and which is related to the functions,*
17 *activities, programs or operations of the public agency.*

18 (2) "Public record" shall not include:

19 (A) Records which are owned by a private person or entity and are
20 not related to functions, activities, programs or operations funded by
21 public funds ~~or~~;

22 (B) records which are made, maintained or kept by an individual who
23 is a member of the legislature or of the governing body of any political or
24 taxing subdivision of the state;

25 (C) *records of any municipal judge, judge of the district court, judge*
26 *of the court of appeals or justice of the supreme court;*

27 (D) *records of any officer or employee of the state or political or*
28 *taxing subdivision of the state if the state or political or taxing subdivision*
29 *does not provide the officer or employee with an office which is open to*
30 *the public at least 35 hours a week; or*

31 ~~(3)(E) "Public record" shall not include records of employers related~~
32 ~~to the employer's individually identifiable contributions made on behalf of~~
33 ~~employees for workers compensation, social security, unemployment~~
34 ~~insurance or retirement. The provisions of this subsection shall not apply~~
35 ~~to records of employers of lump-sum payments for contributions as~~
36 ~~described in this subsection paid for any group, division or section of an~~
37 ~~agency.~~

38 (h) "Undercover agent" means an employee of a public agency
39 responsible for criminal law enforcement who is engaged in the detection
40 or investigation of violations of criminal law in a capacity where such
41 employee's identity or employment by the public agency is secret.

42 Sec. 2. K.S.A. 2014 Supp. 45-217 is hereby repealed.

43 Sec. 3. This act shall take effect and be in force from and after its

- 1 publication in the statute book.



STATE OF KANSAS
OFFICE OF THE ATTORNEY GENERAL

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April 28, 2015

ATTORNEY GENERAL OPINION NO. 2015- 10

The Honorable Anthony Hensley
State Senator, Nineteenth District
State Capitol, Room 318-E
300 S.W. 10th Avenue
Topeka, Kansas 66612

Re: Public Records, Documents and Information—Records Open to the Public—
Open Records Act; Certain Records Not Required to be Open

Synopsis: State employees who utilize a private device and do not utilize public resources to send an email from his or her private email account (private email) are not a "public agency" as defined by the Kansas Open Records Act (KORA) in K.S.A. 2014 Supp. 45-217(f). Accordingly, their private emails are not records subject to the provisions of the KORA. Cited herein: K.S.A. 45-216; K.S.A. 2014 Supp. 45-217; K.S.A. 45-218.

Dear Senator Hensley:

As the State Senator for the 19th District, you request our opinion on an issue related to the Kansas Open Records Act (KORA).¹ In your letter dated February 11, 2015, you ask:

[w]hether an e-mail sent by a state employee from his or her private e-mail account related to functions, activities, programs or operations funded by public funds or records is within the meaning of "public record" under K.S.A. 45-217(g)(1)?

In short, we think the answer is "no."

¹ K.S.A. 45-215 *et seq.*

For purposes of this opinion, we will assume that the email "sent from his or her private account" also was sent from a private device and that neither publicly owned nor publicly controlled equipment, nor other public resources, were used to access the employee's private email account. Throughout this opinion, we will use the term "private email" to reference this combination of assumed facts.

We believe your question about the scope of application of the KORA to state employee privately held emails is one of first impression in Kansas. The answer depends on several statutory provisions, which we set forth here for ease of reference. K.S.A. 45-216(a) states:

It is declared to be the public policy of the state that public records shall be open for inspection by any person unless otherwise provided by this act, and this act shall be liberally construed and applied to promote such policy.

The KORA states that "[a]ll public records shall be open for inspection by any person, except as otherwise provided by this act," K.S.A. 2014 Supp. 45-217(g) sets forth the definition of public record. K.S.A. 2014 Supp. 45-217(g)(1) states, in pertinent part:

"Public record" means any recorded information, regardless of form or characteristics, which is made, maintained or kept by or is in the possession of any public agency

K.S.A. 2014 Supp. 45-217 sets forth the definition of public agency. K.S.A. 2014 Supp. 45-217(f)(1) states, in pertinent part:

"Public agency" means the state or any political or taxing subdivision of the state or any office, officer, agency or instrumentality thereof, or any other entity receiving or expending and supported in whole or in part by the public funds appropriated by the state or by public funds of any political or taxing subdivision of the state.

We have previously opined that the KORA's definition of "public record" can include email messages because an email message is "recorded information" that may be "made, maintained, or kept by" an agency or is "in the possession" of an agency.³

To determine the answer to your inquiry, we must analyze the following statutory question: Whether a "state employee" when engaged in the sending of private emails is a "public agency" within the meaning of K.S.A. 2014 Supp. 45-217(f). Only if we

² K.S.A. 45-218(a).

³ Att'y Gen. Op. No. 2002-1 (concluding that email can be a "public record" under the KORA).

determine that the answer to this question is yes do we reach the issue of whether a state employee private email is a record pursuant to K.S.A. 2014 Supp. 45-217(g).

The plain language of the KORA provides for two alternate tests to determine the presence of a "public agency" covered by the KORA. If, and only if, at least one of these tests is satisfied, does there exist a "public agency" within the meaning of the KORA.

First, a "public agency" means "the state or any political or taxing subdivision of the state or any office, officer, agency or instrumentality thereof, . . ." ⁴ The terms "state employee" and "employee" are not included in this list. In addition, the other terms do not apply because your question about the private emails of state employees necessarily presumes the presence of a living person. ⁵

Second, a "public agency" means "any other entity receiving or expending and supported in whole or in part by the public funds appropriated by the state or by public funds of any political or taxing subdivision of the state." ⁶ To apply this second test to your question, we must consider whether the phrase "any other entity receiving or expending and supported in whole or in part by the public funds appropriated by the state or by public funds of any political or taxing subdivision of the state" includes state employees. We think the answer is no. Although a state employee is, presumably, paid by the state and therefore "supported in whole or in part by the public funds appropriated by the state," we do not think a "state employee" is an "entity" within the meaning of this statutory test. There is no definition of "entity" in the statute, so we look to the common definition and ordinary meaning of the term. An entity is "[a]n organization (such as a business or a governmental unit) that has a legal identity apart from its members or owners." ⁷ Thus, the ordinary meaning of "entity" does not include any flesh-and-blood being, such as an employee.

Thus, reading all of the above analyses together leads to the conclusion that state employees who send private emails, as previously defined, are not a "public agency"

⁴ K.S.A. 2014 Supp. 45-217(f)(1).

⁵ We interpret your question necessarily to presume the presence of a flesh-and-blood individual who sends a private email. We reach this conclusion because we cannot conceive a situation in which a public agency other than a living person could maintain and use a "private" email account; by definition, an email generated from, for example, an email account registered to a state agency, office or instrumentality would be "made, maintained or kept" or "in the possession of" that agency, office or instrumentality and thus could not be a "private email." In addition, you specifically ask about the actions of a "state employee," who presumably must be a living person as opposed to an agency, office, instrumentality or other such organization or entity. Only the word "officer" refers to a living person but state law distinguishes between officers and employees. See Att'y Gen. Op. No. 1999-11.

⁶ K.S.A. 2014 Supp. 45-217(f)(1).

⁷ Black's Law Dictionary (10th Ed 2014)(defining "entity"); Merriam-Webster.com/Dictionary/Entity (accessed 4/27/2015).

Senator Anthony Hensley
Page 4

within the meaning of the KORA.⁸ Accordingly, these private emails of state employees are not public records subject to the provisions of the KORA.

Sincerely,

Derek Schmidt
Kansas Attorney General

Cheryl L. Whelan
Assistant Attorney General

DS:AA:CLW:sb

⁸ Because of this determination, we are not required to analyze whether the exclusions in K.S.A. 2014 Supp. 45-217(f)(2) apply.



Attachment #4

STATE OF KANSAS
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May 6, 2015

Mr. Gordon Self, Revisor
Office of Revisor of Statutes
State Capitol, Suite 24-E
300 SW 10th Ave.
Topeka, Kansas 66612

Dear Mr. Self:

On April 28, 2015, I issued Attorney General Opinion 2015-10, which concluded, in response to a question from Senator Anthony Hensley, that a "state employee" is not a "public agency" within the meaning of K.S.A. 2014 Supp. 45-217(f)(1).¹ Various legislators apparently reached a similar conclusion as evidenced by proposals earlier this year, both in the House of Representatives and the Senate, to amend the Kansas Open Records Act (KORA) to make private emails² subject to that statute's requirements. This conclusion should not be surprising because the KORA was enacted 30 years ago, before the advent of modern electronic communications methods, and most of the language at issue is original to the KORA. There is no indication in the legislative history that the drafters of the KORA gave consideration to any of the constitutional issues or limitations associated with applying a government-run regulatory system, like KORA, to information contained in records that are *privately* made, maintained, kept or possessed by citizens (who also happen to be government employees) without any use of government resources and without any requirement for a nexus (other than mere subject matter overlap) to public business.³ Even if the Legislature did weigh any constitutional considerations

¹ We answered Senator Hensley's question on the narrowest statutory ground that properly disposed of his question. Because we adopted a fair and plausible interpretation of the statute that avoided the need to address the constitutional issues presented in this letter, we had no occasion to discuss these constitutional issues in Attorney General Opinion 2015-10. Like courts, our opinions generally adhere to the canon of constitutional avoidance in construing statutes. See *Clark v. Martinez*, 543 U.S. 371, 381, 125 S. Ct. 716, 160 L. Ed. 2d 734 (2005) ("[T]he canon of constitutional avoidance . . . is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts."); see also *United States v. Sec. Indus. Bank*, 459 U.S. 70, 78, 103 S. Ct. 407, 74 L. Ed. 2d 235 (1982) (quoting *Lorillard v. Pons*, 434 U.S. 575, 577, 98 S. Ct. 866, 55 L. Ed. 2d 40 (1978) (When multiple constructions of a statute are possible, courts "first ascertain whether a construction of the statute is fairly possible by which the constitutional question may be avoided.")).

² I use the term "private emails" in this letter in the same manner it is defined in Attorney General Opinion 2015-10.

³ These constitutional problems are neither new nor unique to private email communications and would have existed in 1984. Consider, for example, a state employee in 1984 who while at home writes on personally owned paper with

when enacting the KORA in 1984, the U.S. Supreme Court has since further refined our understanding of the First Amendment's application to public employees' speech, and pertinent commands of the constitutional case law since 1984 have not been incorporated into the statute.

Because I anticipate legislative interest in attempting to amend the KORA before the end of this legislative session to close this "loophole" in the current statute, I am taking the liberty of providing you additional information that may be helpful in any drafting requests you receive. The policy principle, of course, is simple: recorded information constituting or transacting government business should be subject to the KORA, regardless of whether it is recorded on a public or private email account. However, as the expression goes, the "devil is in the details"—and because the First Amendment is involved, these details are important and difficult.

Our published analysis in Attorney General Opinion 2015-10 was limited to what was necessary to answer the specific legal question Senator Hensley posed. However, the task of drafting legislation that would close this private email loophole in the KORA would present other significant issues outside the scope of Opinion 2015-10. Any statutory amendment would need to be carefully crafted to include a constitutionally satisfactory limitation for its application to privately held records; otherwise, the change would risk inadvertently injecting a constitutional defect into the KORA that could imperil the statute itself. Thus, I offer the following information, research, analysis and recommended language for your consideration and use as you deem appropriate.

CONSTITUTIONAL ISSUES

1. The First Amendment limits the power of the State of Kansas to compel disclosure of its employees' private speech.

The First Amendment states, in pertinent part, "Congress shall make no law . . . abridging the freedom of speech. . . ."⁴ Open-records statutes serve vital public policy objectives in a self-

a personally owned pen information related to his or her work. For the government to claim authority to regulate that personal paper merely because of its content—regardless of whether it is created to be a personal letter to the employee's spouse or an entry in a personal journal—by declaring it a "public record," without any further analysis or limitation on the State's power, would have presented significant constitutional issues in 1984 as it does today. The KORA does contain one provision that acknowledges the existence of some outer boundary to the statute's application to records "owned by a private person or entity." K.S.A. 2014 Supp. 45-217(g)(2). But even if that language were intended in 1984 to satisfy the First Amendment (as opposed to a mere policy preference), it now is outdated as a test for *inclusion* of privately held records because as discussed below the "related to" test in K.S.A. 2014 Supp. 45-217(g)(2) was rejected by the U.S. Supreme Court in 2006 as being impermissibly overbroad; moreover, the meaning of that language as a test for *exclusion* of records is currently being tested in a case of first impression before the Kansas Court of Appeals, although not in the context of private emails. See *Hunter Health Clinic v. Wichita State University*, No. 14-111586-A (Kan. Ct. App.). Against this backdrop of outdated and unsatisfying statutory language, the dramatic expansion of the amount and common use of private "recorded information" made possible by modern private email communications and related technologies amplifies and distinguishes the problem today from that when the KORA was enacted. In 1984, these problems could be (and were) ignored by legislative drafters, thus avoiding consideration of any constitutional issues; now, they are central to the policy discussion, and thus the constitutional issues are squarely presented.

⁴ U.S. Const. amend. I. See also *Unified Sch. Dist. No. 503 v. McKinney*, 236 Kan. 224, 234, 689 P.2d 860, 870 (1984) ("The First and Fourteenth Amendments guarantee that no state shall abridge the freedom of speech.").

governing society.⁵ However, it is well-established that government-compelled disclosures of information are protected by the First Amendment,⁶ and the U.S. Supreme Court has stated specifically that disclosures required under state open-records statutes implicate First Amendment protections.⁷ Even in the service of a noble and important cause, such as open government, the State of Kansas may not violate the First Amendment. Like other citizens, public employees are entitled to First Amendment protection,⁸ and the First Amendment does not permit the State to go fishing about in its citizens' *personal* records in hopes of finding writings or other recorded information that might be properly subject to *public* disclosure.⁹

Therefore, the scope and application of open records statutes, like the KORA, are necessarily limited to whatever access to privately held records, such as private emails, the Legislature has the constitutional authority to grant; a statute that purports to grant access to information in records, outside that authority would be constitutionally suspect. To satisfy the First Amendment, any amendment to the KORA to extend it to private emails (or to other privately held "recorded information") must write into the statute express, constitutionally sound limitations on the statute's reach; if the statute is not sufficiently limited on its face, then it could not later be rendered "constitutional by carving out a limited exemption through an amorphous regulatory interpretation."¹⁰ From a First Amendment standpoint, it's simply not good enough that a statute impermissibly burdening a public employee's speech may be well-intended or serve a valuable purpose, and no requirement that a statute be "liberally construed and applied"¹¹ can overcome the omission from the statute of constitutionally sound limiting terms required by the First Amendment.

⁵ However, open records laws are creatures of the legislature, not commands of the U.S. Constitution, and therefore may not require more access to constitutionally protected information than the State has authority to compel. *See, e.g., McBurney v. Young*, 133 S. Ct. 1709, 1718, 185 L. Ed. 2d 758 (2013) (The U.S. Supreme "Court has repeatedly made clear that there is no constitutional right to obtain all the information provided by FOIA laws. . . . The Constitution itself is [not] a Freedom of Information Act . . . [T]he courts declared the primary rule that there was no general common law right in all persons (as citizens, taxpayers, electors or merely as persons) to inspect public records or documents.") (internal citations and quotation marks omitted). Thus, it was permissible for the Commonwealth of Virginia to enact a statute prohibiting out-of-state persons from accessing its public records.

⁶ *See, e.g., Riley v. Nat'l. Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 795, 108 S. Ct. 2667, 2677, 101 L. Ed. 2d 669 (1988) ("Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech. We therefore consider the Act as a content-based regulation of speech.").

⁷ *See generally John Doe No. 1 v. Reed*, 561 U.S. 186, 130 S. Ct. 2811, 177 L. Ed. 2d 493 (2010) (request under state public records act to disclose names of petition signers subject to First Amendment review).

⁸ *Garceiti v. Ceballos*, 547 U.S. 410, 417, 126 S. Ct. 1951, 1957, 164 L. Ed. 2d 689 (2006) (The Supreme Court "has made clear that public employees do not surrender all their First Amendment rights by reason of their employment. Rather, the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern.").

⁹ *See, e.g., United States v. Jones*, 132 S. Ct. 945, 956, 181 L. Ed. 2d 911 (2012) (Sotomayor, J. concurring) (Government regulations that seek to gather information about citizens' private speech and communications habits may be prohibited by the First Amendment because mere "[a]wareness that the Government may be watching chills associational and expressive freedoms.").

¹⁰ *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 324, 130 S. Ct. 876, 889, 175 L. Ed. 2d 753 (2010).

¹¹ K.S.A. 45-216(a). *See also Bergstrom v. Spears Mfg. Co.*, 289 Kan. 605, 608, 214 P.3d 676, 678 (2009) ("The court will not speculate on legislative intent and will not read the statute to add something not readily found in it.").

2. Without more, a statutory definition that “public record” includes records containing information “related to functions, activities, programs or operations funded by public funds” would be constitutionally insufficient if applied to private emails or other privately held “recorded information.”

- A. By definition, the “related to” test is a content-based regulation of speech and likely would fail strict scrutiny analysis as applied to public employees’ private emails.

In distinguishing the private emails of a public employee that may be regulated by the State as “public records” from those that fall outside the authority of the State to regulate, the U.S. Constitution requires more than an assessment of the *content* of the private emails. The U.S. Supreme Court has explained that “the distinction between laws burdening and laws banning speech is but a matter of degree and that the Government’s content-based burdens must satisfy the same rigorous scrutiny as its content-based bans.”¹² Thus, a law burdening a public employee’s speech by requiring that he or she produce (or defend a refusal to produce when confronted with a government demand) *any and all* private email that contains subject matter “related to” his or her work would face the same First Amendment analysis as a content-based ban on the employee’s speech.

With few exceptions that are not relevant here,¹³ the First Amendment subjects to strict scrutiny any government efforts to regulate speech based on its content. “If a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest. If a less restrictive alternative would serve the Government’s purpose, the legislature must use that alternative.”¹⁴ Even assuming that the purposes of the KORA constitute a compelling government interest, the government still would bear the burden¹⁵ to demonstrate that the statute is narrowly tailored and that no less restrictive alternative would serve the compelling interest. Without statutory limitation beyond the mere *content* of a public employee’s private emails to guide which private emails constitute “public records,” the statute plainly would not be narrowly tailored and a less restrictive alternative would be available. In a closely analogous case, the U.S. Supreme Court has expressly rejected the “related to” test for regulating the speech of public employees because “[t]he First Amendment protects some expressions related to the speaker’s job;”¹⁶ the same reasoning would apply here.

¹² *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2664, 180 L. Ed. 2d 544 (2011) (internal quotation marks and citations omitted).

¹³ See, e.g., *Chaplinsky v. New Hampshire*, 315 U.S. 568, 62 S. Ct. 766, 86 L. Ed. 1031 (1942) (certain well-defined and narrowly limited categories of speech unprotected by the First Amendment).

¹⁴ *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 813, 120 S. Ct. 1878, 1886, 146 L. Ed. 2d 865 (2000) (internal and citations omitted).

¹⁵ The usual presumption of constitutionality would not apply to such a statute. See *United States v. Alvarez*, 132 S. Ct. 2537, 2544 (2012) (quoting *Ashcroft v. ACLU*, 542 U.S. 656, 660, 124 S. Ct. 2783, 2788, 159 L. Ed. 2d 690 (2004)) (“[T]he Constitution ‘demands that content-based restrictions on speech be presumed invalid . . . and that the Government bear the burden of showing their constitutionality.’”).

¹⁶ *Garcetti*, 547 U.S. at 421. The *Garcetti* court illustrated the point with this example: “Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal. The same is true of many other categories of public employees.” *Id.* (internal quotation marks and citations omitted).

- B. Without more, the “related to” test burdens a substantial amount of protected public-employee speech and thus would risk rendering part of the KORA unconstitutionally overbroad on its face.

The “related to” test for declaring public employee private emails to be “public records,” taken alone, is constitutionally suspect on its face under the First Amendment overbreadth doctrine. The U.S. Supreme Court long has recognized that “[b]road prophylactic rules in the area of free expression are suspect. . . . Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.”¹⁷ Under the First Amendment overbreadth doctrine, which is a form of facial challenge, “a law may be overturned as impermissibly overbroad because a substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.”¹⁸ The overbreadth doctrine protects against self-censorship and an unconstitutional chilling effect on protected speech: “The purpose of the overbreadth doctrine is to excise statutes which have a deterrent effect on the exercise of protected speech.”¹⁹ The Kansas Supreme Court has explained:

[A]n overbroad statute makes conduct punishable which under some circumstances is constitutionally protected. . . . A successful overbreadth challenge can thus be made only when 1) the protected activity is a significant part of the law’s target, and 2) there exists no satisfactory method of severing that law’s constitutional from its unconstitutional application.²⁰

Here, if the only statutory test of whether a public employee’s private emails are “public records” subject to the KORA were that the content of any such email “related to” the subject matter of public business, then the KORA on its face would apply to a virtually *unlimited* amount of private and personal information of public employees.

To illustrate the broad sweep of the “related to” test if it were applied to private emails, consider a hypothetical public employee who sends a private email to his or her spouse stating, “I had a bad day at work because we couldn’t get the agency budget to balance again” and then proceeds to describe the problem. Or an employee who records daily activities, including his or her public work activities, in a private email to his or her children who are away at college. Or an employee who sends a private email to his or her union representative disclosing concerns about

¹⁷ *NAACP v. Button*, 371 U.S. 415, 438, 83 S. Ct. 328, 340, 9 L. Ed. 2d 405 (1963) (citations omitted).

¹⁸ *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 n.6, 128 S. Ct. 1184, 1190, 170 L. Ed. 2d 151 (2008) (internal quotation marks omitted).

¹⁹ *Rosenfeld v. New Jersey*, 408 U.S. 901, 908, 92 S. Ct. 2479, 2482, 33 L. Ed. 2d 321 (1972) (footnote omitted) (Powell, J. dissenting); see also *id.* at 907, 2482 (“[The overbreadth doctrine] results often in the wholesale invalidation of the legislature’s handiwork, creating a judicial-legislative confrontation. In the end, this departure from the normal method of judging the constitutionality of statutes must find justification in the favored status of rights to expression and association in the constitutional scheme.”) (internal quotation marks omitted) (quoting Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844, 852 (1970)).

²⁰ *State v. Whitesell*, 270 Kan. 259, 270, 13 P.3d 887, 900 (2000) (quoting *State ex rel. Murray v. Palmgren*, 231 Kan. 524, 533, 646 P.2d 1091 (1982)).

the public workplace. Or an employee who writes, under a pseudonym,²¹ a privately emailed article criticizing the agency where he or she works. Or an employee who sends a private email with important public information about a public agency matter to a watchdog or news organization. Or an employee who sends a private email to, or as part of, a political campaign providing commentary or information about state or local government. Or an employee who engages in political debate or discussion, by private email, criticizing state or local government. Or an employee who communicates, through private email, with a minister or other religious adviser about personal stressors, ethical dilemmas or other issues related to his or her work. Or an employee who sends a private email to personal friends characterizing or describing the employee's interactions at the office with coworkers or supervisors. Clearly, the State has no legitimate reason (or constitutional authority) to regulate these sorts of private communications as "public records" merely because they mention or discuss matters "related to" the public employee's work, and the threat the State might do so would impermissibly chill constitutionally protected expression.

In the absence of additional statutory limits beyond the "related to" test, there would "exis[t] no satisfactory method of severing that law's constitutional from its unconstitutional application."²² Nor could this overbreadth be cured by somehow adopting a *practice* of using the KORA solely to reach constitutionally *appropriate* private emails, such as those that actually involve the conduct or transaction of public business; the First Amendment does not permit courts to uphold an overbroad statute that impermissibly burdens a substantial amount of protected speech "merely because the Government promise[s] to use it responsibly."²³ If the KORA were to be extended to apply to private emails, the statute would need to expressly impose a limit, consistent with the First Amendment, on the scope of private emails (or other "recorded information") to be included within its sweep. The "related to" test is not sufficiently limited to satisfy the First Amendment.

3. To extend KORA to private emails, the First Amendment would be satisfied by a "pursuant to official duties" test.

In drawing the line to determine the boundaries of the First Amendment's shield that surrounds public employee speech, the U.S. Supreme Court in 2006 adopted a "pursuant to official duties" test. In interpreting the First Amendment to permit a public employer to discipline an employee for the employee's speech about office-related matters, the Supreme Court held:

We hold that when public employees make statements *pursuant to their official duties*, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.²⁴

²¹ See *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341-42, 115 S. Ct. 1511, 1516, 131 L. Ed. 2d 426 (1995) (noting right to publish pseudonymously is protected by the First Amendment and government-imposed burdens on that right are subject to strict scrutiny).

²² *Whitesell*, 270 Kan. at 270 (quoting *Palmgren*, 231 Kan. at 533).

²³ *United States v. Stevens*, 559 U.S. 460, 480, 130 S. Ct. 1577, 1591, 176 L. Ed. 2d 435 (2010).

²⁴ *Garcetti*, 547 U.S. at 421 (emphasis added).

The same reasoning would apply here. Thus, an amendment to the KORA that requires public employees to produce private emails that were made, maintained, kept or possessed “pursuant to their official duties” would be constitutionally permissible. This test is distinct from the “related to” test, which looks only at the *content* of the private email and not at the *reason* for its existence. Under the “pursuant to official duties” test, a public employee who uses a private email account to bypass KORA when conducting or transacting public business would be acting “pursuant to their official duties” and the private email would be a “public record.” However, if the employee sent a private email to, for example, his or her mother and in that personal communication (sent not as a public employee but as a citizen or as a son or daughter) mentions or discusses matters “related to” his or her agency or office, that email would not be a “public record.” This distinction should satisfy the important public interest in government openness while also remaining within the bounds of the First Amendment as interpreted in current U.S. Supreme Court case law.²⁵

LEGISLATION CONSIDERED EARLIER THIS YEAR IS INADEQUATE

On February 2, 2015, the House of Representatives considered but defeated an amendment that proposed a version of the “pursuant to official duties” test by requiring both that a “public record” be “in furtherance of such public agency’s duties” and also have a “substantial nexus with the public agency’s duties.”²⁶ However, that amendment did not resolve the statutory definition problem identified in Attorney General Opinion 2015-10. Thus, if that amendment had been adopted in the form proposed, it likely would have cured the First Amendment defect that precludes applying the current KORA to private emails but nonetheless would not have successfully applied the KORA to the private emails of state employees who currently are omitted from the statute’s terms.

Senate Bill 201 remains pending in that body, and on March 19, 2015, during floor debate on House Bill 2023, its text was considered but defeated as an amendment.²⁷ That bill/amendment proposed a version of the “pursuant to official duties” test by requiring that the record be “in furtherance of the public agency’s duties” and also retained the current law’s “related to” test. However, it did not address the statutory definition problem identified in Attorney General Opinion 2015-10. In addition, because the amendment by its terms would have applied only to records “made, maintained or kept on a personal electronic device,” its adoption may have created an implication that the KORA would not apply to other privately made, maintained or kept “recorded information.” That amendment also does not appear to include a definition of “personal electronic device.” Thus, if that bill/amendment were adopted in the form proposed, it likely would have cured the First Amendment defect that precludes applying the current KORA

²⁵ One oft-cited legal article has described the purpose of the KORA as allowing public access of the “*business workings* of state and local government” and as strongly “favor[ing] openness in *governmental transactions*.” Theresa Marcel Nuckolls, *Kansas Sunshine Law; How Bright Does It Shine Now? The Kansas Open Meetings and Open Records Acts*, 72 J. Kan. B. Ass’n 28, 29 (May 2003) (emphasis added). Both of those purposes would be wholly satisfied by the “pursuant to official duties” test.

²⁶ House Journal 144-45 (2015 Session) (motion of Representative Ward).

²⁷ Senate Journal 297 (2015 Session) (motion of Senator Hensley).

to private emails but nonetheless would not have successfully applied the KORA to the private emails of state employees who currently are omitted from the statute's terms.

PROPOSED LEGISLATIVE LANGUAGE

In light of the above analysis, we have taken the liberty of preparing draft legislative language that we think would extend the KORA to apply to the private emails of public employees when used to conduct public agency business without running afoul of existing U.S. Supreme Court precedent. A copy is enclosed with this letter. It contains six important elements:

First, it removes the term "officer" from K.S.A. 2014 Supp. 45-217(f)(1), rendering a "public agency" defined by (f)(1) to consist *only* of government or corporate entities, not of living beings.²⁸ This is important because (1) the problem of distinguishing protected private emails from private emails that may be "public records" is unique to the context of flesh-and-blood individuals since government entities, by definition, cannot maintain a private email account; and (2) defining individuals to be a "public agency" renders other parts of the KORA unreasonable or absurd²⁹ and thus subject to legal challenge. The two concepts should be separated into different paragraphs for distinct handling rather than intermingled in the same paragraph.

Second, it inserts "location" into the definition of "public record" in K.S.A. 2014 Supp. 45-217(g)(1). This insertion makes clear that the location of the record (for example, on a private email server) is not, *per se*, an impediment to defining it as a public record.

Third, it inserts a new subparagraph (B) in the definition of "public record" in K.S.A. 2014 Supp. 45-217(g)(1) that expressly applies to living persons who do the work of public agencies. Specifically, this new subsection would apply to "officers" (the term relocated from K.S.A. 2014 Supp. 45-217(f)(1), as described above) and to "employees," who are not currently covered by the statute. This insertion of "employee" remedies the omission identified in Attorney General

²⁸ On its face, neither an "office" nor an "agency" can be a living person. While in some contexts, the term "instrumentality" might include living persons, the context here suggests otherwise. For example, to interpret "instrumentality" here to include living persons would be to attach to such living persons various other duties of a "public agency," which would lead to absurd or unreasonable results as discussed in footnote 29. Moreover, the term "instrumentality" is undefined in the KORA and thus should be given its ordinary meaning; the term is ordinarily defined as a "thing" or an "agency . . . such as a branch of a governing body," none of which implies inclusion of a living person. See Black's Law Dictionary (10th ed. 2014) (defining instrumentality). Additionally, interpreting "instrumentality" to be distinct from living "person" is analogous to the manner in which Kansas courts long have interpreted the term in the context of tax law. See, e.g., *Clinton v. State Tax Comm'n*, 146 Kan. 407, 71 P.2d 857, 866 (1937).

²⁹ For example, K.S.A. 2014 Supp. 45-219(c) authorizes a public agency to "prescribe reasonable fees for providing access to or furnishing copies of public records," but it would be absurd and unreasonable to authorize each and every public officer or employee (as an individual "public agency") to set his or her own fee schedule. Additionally, K.S.A. 2014 Supp. 45-220(a) requires that "[e]ach public agency shall adopt procedures to be followed in requesting access to and obtaining copies of public records," but it would be absurd and unreasonable to require each and every public officer or employee to adopt his or her own procedures for handling open records requests. See generally *State v. Tapia*, 295 Kan. 978, 992, 287 P.3d 879, 889 (2012) ("It is a fundamental rule of statutory interpretation that courts are to avoid absurd or unreasonable results.").

Opinion 2015-10 and also is consistent with the phrase “officer or employee of a public agency” that the Legislature has used elsewhere in the KORA.³⁰

Fourth, it constructs within the new subsection (B) constitutionally sound limiting principles that allow for the application of the KORA to the private emails of flesh-and-blood officers and employees who work in state government, or any political or taxing subdivision thereof, without violating their First Amendment rights. It adopts the Supreme Court’s *Garcetti* test for permitting government regulation of state employee speech that is “pursuant to official duties” and *also* includes the familiar “related to” test currently found in K.S.A. 2014 Supp. 45-217(g)(2).³¹ The First Amendment would not be offended by the two tests operating in conjunction; it is offended only by the State’s reliance on the “related to” test alone.

Fifth, consistent with the approach of separating non-living “public agencies” from living “officers and employees,” it relocates the exclusions for judges and part-time officers and employees currently found in K.S.A. 45-217(f)(2)(B) and (C) to subsection (g)(2). In short, this reorganization ensures the current law’s limitation for judges and part-time officers and employees actually applies to officers and employees, which is the intent of the language.

Sixth, it consolidates all existing exceptions to the definition of “public record” into subsection (g)(2) for ease of reference and understanding.

Thank you for your consideration of this information, analysis and recommendation. I hope it is helpful. While I am one who believes the private email “loophole” in the KORA should be fixed, I also am mindful that in the delicate area of government regulation of speech, an ill-considered “fix” risks unintentionally creating more problems than it solves. We now know more than we did in 1984 about what the First Amendment requires, and forbids, when applying open records laws to private records that contain public employee speech, and in my view we should update the KORA to reflect the current state of the law and the realities of modern communications technology.³²

³⁰ Compare the definition of “official custodian” in K.S.A. 2014 Supp. 45-217(e) (any “officer or employee of a public agency”) with the definition of “public agency” in K.S.A. 2014 Supp. 45-217(f)(1) (including only “officer” but not “employee”).

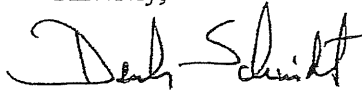
³¹ Please note that in this reference, we also substituted the phrase “of the public agency” for the phrase “funded by public funds.” We made that substitution because, in the context of applying KORA to public employees, the phrase “of the public agency” seems both more appropriate and more inclusive; however, the choice between these two phrases is not imperative to our analysis or recommendation.

³² Rapidly evolving communications technology also has presented significant Fourth Amendment issues regarding public employees’ private emails. The state of the law in that area is in significant flux, and thus we cannot offer a further recommendation at this time and do not recommend waiting for judicial clarity on any potential Fourth Amendment issues before repairing the identified First Amendment concerns in applying the KORA to private emails. See, e.g., *City of Ontario v. Quon*, 560 U.S. 746, 756, 130 S. Ct. 2619, 2628, 177 L. Ed. 2d 216 (2010) (recognizing, in the context of government employees’ electronic communications, “the general principle that [i]ndividuals do not lose Fourth Amendment rights merely because they work for the government instead of a private employer”); *id.* at 759 (“The judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear.”); see also *In re U.S. for Historical Cell Site Data*, 724 F.3d 600, 616 (5th Cir. 2013) (citing *Jones*, 132 S. Ct. at 953–54; *Quon*, 130 S. Ct. at 2629–30) (Dennis, J. dissenting) (“The substantial difficulty of this question is reflected in the Supreme Court’s conscientious

Gordon Self
May 6, 2015
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If I may be of further assistance to you or the Legislature in attempting to fix the current statute's shortcomings, please let me know.

Sincerely,

A handwritten signature in black ink, appearing to read "Derek Schmidt". The signature is fluid and cursive, with the first name "Derek" and last name "Schmidt" clearly distinguishable.

Derek Schmidt
Kansas Attorney General

Enclosure (proposed KORA amendment)

Cc: Honorable Susan Wagle
Honorable Ray Merrick
Honorable Anthony Hensley
Honorable Tom Burroughs
Honorable Jeff King
Honorable John Barker

avoidance of similar questions regarding the Fourth Amendment implications of modern telecommunications technologies.").

45-217. Definitions

As used in the open records act, unless the context otherwise requires:

(a) "Business day" means any day other than a Saturday, Sunday or day designated as a holiday by the congress of the United States, by the legislature or governor of this state or by the respective political subdivision of this state.

(b) "Clearly unwarranted invasion of personal privacy" means revealing information that would be highly offensive to a reasonable person, including information that may pose a risk to a person or property and is not of legitimate concern to the public.

(c) "Criminal investigation records" means records of an investigatory agency or criminal justice agency as defined by K.S.A. 22-4701, and amendments thereto, compiled in the process of preventing, detecting or investigating violations of criminal law, but does not include police blotter entries, court records, rosters of inmates of jails or other correctional or detention facilities or records pertaining to violations of any traffic law other than vehicular homicide as defined by K.S.A. 21-3405, prior to its repeal, or K.S.A. 21-5406, and amendments thereto.

(d) "Custodian" means the official custodian or any person designated by the official custodian to carry out the duties of custodian of this act.

(e) "Official custodian" means any officer or employee of a public agency who is responsible for the maintenance of public records, regardless of whether such records are in the officer's or employee's actual personal custody and control.

(f)(1) "Public agency" means the state or any political or taxing subdivision of the state or any office, ~~officer,~~ agency or instrumentality thereof, or any other entity receiving or expending and supported in whole or in part by the public funds appropriated by the state or by public funds of any political or taxing subdivision of the state.

(2) "Public agency" shall not include: ~~(A) any entity solely by reason of payment from public funds for property, goods or services of such entity; (B) any municipal judge, judge of the district court, judge of the court of appeals or justice of the supreme court; or (C) any officer or employee of the state or political or taxing subdivision of the state if the state or political or taxing subdivision does not provide the officer or employee with an office which is open to the public at least 35 hours a week.~~

(g)(1) "Public record" means any recorded information, regardless of form, ~~or characteristics or location,~~ which is made, maintained or kept by or is in the possession of:

(A) any public agency including, but not limited to, an agreement in settlement of litigation involving the Kansas public employees retirement system and the investment of moneys of the fund;
or

(B) any officer or employee of a public agency pursuant to the officer's or employee's official duties and which is related to the functions, activities, programs or operations of the public agency.

(2) "Public record" shall not include:

(A) records which are owned by a private person or entity and are not related to functions, activities, programs or operations funded by public funds; or

(B) records which are made, maintained or kept by an individual who is a member of the legislature or of the governing body of any political or taxing subdivision of the state;

(C) records of any municipal judge, judge of the district court, judge of the court of appeals or justice of the supreme court;

(D) records of any officer or employee of the state or political or taxing subdivision of the state if the state or political or taxing subdivision does not provide the officer or employee with an office which is open to the public at least 35 hours a week; or

(E) records of employers related to the employer's individually identifiable contributions made on behalf of employees for workers compensation, social security, unemployment insurance or retirement. The provisions of this subsection shall not apply to records of employers of lump-sum payments for contributions as described in this subsection paid for any group, division or section of an agency.

~~(3) "Public record" shall not include records of employers related to the employer's individually identifiable contributions made on behalf of employees for workers compensation, social security, unemployment insurance or retirement. The provisions of this subsection shall not apply to records of employers of lump-sum payments for contributions as described in this subsection paid for any group, division or section of an agency.~~

(h) "Undercover agent" means an employee of a public agency responsible for criminal law enforcement who is engaged in the detection or investigation of violations of criminal law in a capacity where such employee's identity or employment by the public agency is secret.

State approaches to “public records”

Mike Kautsch - 10/6/15

Below is a list of states that indicates the approaches they have taken to defining the term “public records.”

The list is adapted from two memoranda, dated August 28 and September 14, that were distributed to the Open Records Advisory Committee. The information in the memos provided a basis for comparing and contrasting the definition of “public records” in the Kansas Open Records Act (KORA) with various other states’ definitions.

The memos included detail mainly about: 1) states where controversies had erupted over their definitions of “public records,” especially when applied to electronic communications; 2) states whose laws appeared to illustrate substantive alternatives to the definition of “public records” in KORA; 3) states that border Kansas, and 4) states whose definition resembled the definition of “records” in the Kansas Preservation Act (KPA).

The definition in KPA, K.S.A. 45-402(d), includes records that an agency makes or receives “in connection with the transaction of official business or bearing upon the official activities and functions of any governmental agency.” In the list below, boldface type is used to highlight similar language in the open records laws of a number of states.

An asterisk after the name of a state signifies that the information about that state’s definition of “public records” is an excerpt from *Open Records Laws: A State By State Report*, National Association of Counties (December 2010), <http://www.naco.org/sites/default/files/documents/Open%20Records%20Laws%20A%20State%20by%20State%20Report.pdf>. (The Web link to this report was included in the August 28 memorandum distributed to members of the Open Records Advisory Committee.)

Some states tend to define “public records” somewhat like Kansas does in KORA, which defines such a record as one that is “made, maintained or kept by or is in the possession of any public agency.”

Some states tend to be specific about what constitutes a “public record.” For example, Pennsylvania’s public records law lists a number of records by type.

Other states define “public records” with reference to whether their content relates to public business, like Kansas does in KPA. Among states that defines “public records” with reference to content, Delaware illustrates perhaps the broadest approach, including as “public records” those that relate “in any way of public interest.”

Under their public records laws, some states define “public records” with reference to the actions of public agencies rather than to the agencies’ officers or employees. For example, Kansas, in KORA, defines “public records” as public agencies’ recorded information. Some other states, however, define “public records” in relation to those who work for the agencies. In Massachusetts, for example, the definition of “public records” includes records “made or received by any officer or employee of any agency.”

Alabama*

Alabama Code § 36-12-2 (2001) states that “[a]ll public officers and servants shall correctly make and accurately keep...all such books or sets of books, documents, files, papers, letters and copies of letters...**in reference to the activities or business required to be done....**”

Under the Public Records Law, “[e]very public officer having the custody of a public writing which a citizen has a right to inspect is bound to give him, on demand, a certified copy of it, on payment of the legal fees therefor.” ...

The term “public writing” that appears in the Public Records Law has been interpreted to include the definition of “public records” according to Alabama Code § 41-13-1 (2000). In essence, all written and typed materials made by public officials **in the course of conducting public business** are subject to the law.

The Supreme Court has extended this definition to include audio-visual and computerized data, as well.

Interpretations have broadly defined the scope and type of materials subject to the law in favor of maximum disclosure.

Alaska

A record is any document, “regardless of physical form or characteristic, developed or received under law or **in connection with the transaction of official business** and preserved or appropriate for preservation by an agency or a political subdivision, as evidence of the organization, function, policies, decisions, procedures, operations, or other activities of the state or political subdivision or because of the informational value in them...” AS § 40.21.150(6). (Emphasis added.)

The Alaska Supreme Court has recognized that a “duty to preserve emails exists as to both official accounts and private accounts, and that the duty cannot be extinguished by a public official’s unreviewable decision simply not to preserve them.” *McLeod v. Parnell*, 286 P.3d 509, 516 (Alaska Sup. Ct., 2012)

Arizona

Records are materials, regardless of form or characteristics, “made or received by any governmental agency in pursuance of law or **in connection with the transaction of public business** and preserved or appropriate for preservation by the agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations or other activities of the government, or because of the informational and historical value of data contained in the record, and includes records that are made confidential by statute.” A.R.S. § 41-151.18, incorporated by reference in A.R.S. § 39-121.01, regarding “Definitions; maintenance of records; copies, printouts or photographs of public records; examination by mail; index.” (Emphasis added.)

The Arizona Supreme Court has observed that: “Not every document which comes into the possession or custody of a public official is a public record. It is the nature and purpose of the document, not the place where it is kept, which determines its status.” *Salt River Pima-Maricopa Indian Community*, 168 Ariz. 531, 538 (1991), quoting *Linder v. Eckard*, 152 N.W.2d 833, 835 (Iowa Sup. Ct., 1967).

Arkansas

A.C.A. 25-19-103 (6)(A) provides that: “‘Public records’ means writings, recorded sounds, films, tapes, electronic or computer-based information, or data compilations in any medium required by law to be kept or otherwise kept and that constitute a record of the performance or lack of performance of official functions that are or should be carried out by a public official or employee, a governmental agency, or any other agency or improvement district

that is wholly or partially supported by public funds or expending public funds. All records maintained in public offices or by public employees within the scope of their employment shall be presumed to be public records.”

The Arkansas Supreme Court has held that a check drawn on a private account was a public record subject to disclosure. The check was written by a judge’s law clerk to obtain copies of certain documents for the judge. The clerk received reimbursement in cash from the judge. The Court said, “There is no question that a check for this purchase written on [a] bank account would be a public record subject to the requirements of the [state freedom of information act]. [The judge] cannot shield from disclosure the records of his actions merely because the check was drawn on a private bank to perform the same function that would have been performed using a properly drawn ‘public’ check.” *Fox v. Perroni*, 358 Ark. 251, 258 (2004).

Note: For another account of the Arkansas law see the appendix below.

California*

The courts, with approval from the Attorney General, have adopted a broad definition of “public records” that covers “every conceivable kind of record that is involved in the governmental process...” Records that are purely personal in content are not subject to the act.

Colorado

Public records are writings held by government entities “for use in the exercise of functions required or authorized by law or administrative rule or involving the receipt or expenditure of public funds.” C.R.S.A. § 24-72-202(6)(a)(I).

A television news organization’s “review of email use among public officials reveals all 100 members of the Colorado General Assembly use private accounts to conduct state business. The policy and practice has been in place for many years, giving each individual lawmaker full control of what emails will be released when their emails become the subject of records requests under the Colorado Open Records Act.”

“‘It makes it difficult for a member of the public to request all emails on a particular topic that relate to public business,’ attorney said Steve Zansberg, president of the Colorado Freedom of Information Coalition. ‘Any record that discusses public business, is public record regardless of where it’s located.’” Jeremy Jojola, *Lawmakers use private emails for state business*, 9News (May 11, 2015), <http://www.9news.com/story/news/local/investigations/2015/05/11/lawmakers-use-private-emails-for-state-business/27147055/>.

Note: For another account of the Colorado law, see the appendix below.

Delaware*

“Public record” is broadly defined as “information of any kind, owned, made, used, retained, received, produced, composed, drafted or otherwise compiled or collected, by any public body, relating in any way to public business, or in any way of public interest...”

Florida

“‘Public records’ means all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency. West’s F.S.A. § 119.011(12). (Emphasis added.)

The Florida Supreme Court has held that “‘personal’ e-mails are not ‘made or received pursuant to law or ordinance or in connection with the transaction of official business’ and, therefore, do not fall within the definition of public records...by virtue of their placement on a government-owned computer system.” *State v. City of Clearwater*, 863 So.2d 149, 155 (Florida Sup. Ct., 2003)

Georgia*

Records “prepared and maintained or received in the course of the operation of a public office or agency” are subject to the Georgia Open Records Act.

The term “public office or agency” has been interpreted broadly so as to favor disclosure. This includes executive offices at the state and local levels. These agencies may not adopt administrative rules or agreements to limit the applicability of the act.

Hawaii*

All existing government records, unless statutorily mandated otherwise, are subject to the act, regardless of physical form. Agencies are not required to generate new records upon request, though they must provide records in the requested format if the records already exist in that format.

Idaho*

The act encompasses both state and local agencies within the executive, judicial, and legislative branches of government....

The definition of records is as broad as the definition of the public entities defined under the act. The term “public records” includes “any writing containing information relating to the **conduct or administration of the public’s business** prepared, owned, used or retained by any state agency, independent public body corporate and politic or local agency regardless of physical form or characteristics.”

Illinois*

The definition of public records is quite broad and includes, though is not limited to, “all records, reports, forms, writings, letters, memoranda, books, papers, maps, photographs, ... electronic data processing records, recorded information and all other documentary materials, regardless of physical form or characteristics, having been prepared... used, received, possessed or under the control of any public body.”

Indiana*

The definition of “public record” was amended in 2003 and encompasses materials which are “created, received, retained, maintained, or filed by or with a public agency...”

Previous acts contained the word “used” among the verbs found in the definition of public records. Whether this revision will have much effect on the public’s access to records remains to be seen.

This definition applies to all records regardless of physical format.

Iowa*

The statute defines “public records” as “all records, documents, tape, or other information, stored or preserved in any medium, of or belonging to this state or any county, city,

township, school corporation, political subdivision, nonprofit corporation... [which is] supported in whole or in part with property tax revenue..., or tax-supported district in this state, or any branch, department, board, bureau, commission, council, or committee of any of the foregoing.” ... the Iowa Supreme Court has had the opportunity to clarify and establish a test to determine which records are indeed subject to disclosure:

“When, as is the case under section 22.7(11), a statutory exemption does not articulate precisely what records or information the legislature considers private, courts commonly apply the following factors as a means of weighing individual privacy interests against the public’s need to know: (1) the public purpose of the party requesting the information; (2) whether the purpose could be accomplished without the disclosure of personal information; (3) the scope of the request; (4) whether alternative sources for obtaining the information exist; and (5) the gravity of the invasion of personal privacy.”

Kansas

KORA, in K.S.A. 45-217, states:

“(g)(1) ‘Public record’ means any recorded information, regardless of form or characteristics, which is made, maintained or kept by or is in the possession of any public agency including, but not limited to, an agreement in settlement of litigation involving the Kansas public employees retirement system and the investment of moneys of the fund.

“(2) ‘Public record’ shall not include records which are owned by a private person or entity and are not related to functions, activities, programs or operations funded by public funds or records which are made, maintained or kept by an individual who is a member of the legislature or of the governing body of any political or taxing subdivision of the state.

“(3) ‘Public record’ shall not include records of employers related to the employer’s individually identifiable contributions made on behalf of employees for workers compensation, social security, unemployment insurance or retirement. The provisions of this subsection shall not apply to records of employers of lump-sum payments for contributions as described in this subsection paid for any group, division or section of an agency.”

KORA, in K.S.A. 45-217(f)(1) defines “public agency” to include an “officer” but does not refer to employees. In (f)2(C), KORA says a “public agency” does not include “any officer or employee of the state or political or taxing subdivision of the state if the state or political or taxing subdivision does not provide the officer or employee with an office which is open to the public at least 35 hours a week.”

Kentucky

Public records are writings and other “documentation regardless of physical form or characteristics, which are prepared, owned, used, in the possession of or retained by a public agency. ‘Public record’ shall not include any records owned or maintained by or for a body referred to in subsection (1)(h) of this section that are not related to functions, activities, programs, or operations funded by state or local authority[.]” KRS 61.870(2).

Kentucky defines “public agency” to include: “Every state or local government officer,” KRS 61.870(a).

KORA was based in part on the Kentucky Open Records Act. See *Data Tree v. Meek*, 279 Kan. 445 (2005).

Louisiana*

The act covers all records which relate to “the conduct, **transaction, or performance of any business, transaction, work, duty, or function** ... performed by or under the authority of the constitution or laws of this state, ... any ordinance, regulation, mandate, or order of any public body” or the receipt or expenditure of public funds. .

This broad definition reaches all records, regardless of physical format, not specifically exempted by statute or order of the court. (Emphasis added.)

Maine

A public record is defined as any material that “has been received or prepared for use **in connection with the transaction of public or governmental business** or contains information relating to the transaction of public or governmental business....” 1 M.R.S.A. § 402. (Emphasis added.)

Frequently Asked Questions, Your Right to Know, The Maine Freedom of Access Act, <http://www.maine.gov/foaa/faq/>, includes this point:

“Are an agency's or official's e-mails public records?”

“Any record, regardless of the form in which it is maintained by an agency or official, can be a public record. As with any record, if the e-mail is ‘in the possession or custody of an agency or public official of this State or any of its political subdivisions, or is in the possession or custody of an association, the membership of which is composed exclusively of one or more of any of these entities, and has been received or prepared for use in connection with the transaction of public or governmental business or contains information relating to the transaction of public or governmental business’ and is not deemed confidential or excepted from the FOAA, it constitutes a “public record”. 1 M.R.S. § 402(3)

“An agency or official must provide access to electronically stored public records, including e-mails, as a printed document or in the medium it is stored at the discretion of the requestor. If an agency or official does not have the ability to separate or prevent the disclosure of confidential information contained in an e-mail, the agency is not required to provide the records in an electronic format.” 1 M.R.S. § 408-A(7).

“Email messages are subject to the same retention schedules as other public records based on the content of the message. There are no retention schedules specific to email messages.”

Maryland*

The act broadly defines public records and those who must disclose them:

“‘Public record’ means the original or any copy of any documentary material...made by a unit or instrumentality of the State government or of a political subdivision or received by the unit or instrumentality in connection with the **transaction of public business**. (Emphasis added.)

Massachusetts*

The Public Records Law covers materials “made or received by any officer or employee of any agency, executive office, department, board, commission, bureau, division or authority of the Commonwealth, or of any political subdivision thereof, or of any authority established by the [Legislature] to serve a public purpose.”

Michigan*

The act defines public records as any “writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created.”

“Writing” is further defined to encompass multiple forms of media “or other means of recording or retaining meaningful content.”

Minnesota*

The act encompasses state agencies, defined as “any office, officer, department, division, bureau, board, commission, authority, district or agency of the state,” along with all political subdivisions, including cities; towns; school districts; and “any board, commission, district or authority created pursuant to law.” Rather than defining “records,” the act refers to “government data,” which encompasses “all data collected, created, received, maintained or disseminated by any government entity.”

Mississippi

“‘Public records’ shall mean all books, records, papers, accounts, letters, maps, photographs, films, cards, tapes, recordings or reproductions thereof, and any other documentary materials, regardless of physical form or characteristics, having been used, being in use, or prepared, possessed or retained for use **in the conduct, transaction or performance of any business, transaction, work, duty or function of any public body**, or required to be maintained by any public body.” Miss. Code Ann. § 25-61-3. (Emphasis added.)

An ethics commission analysis has said: “Any text message used by a city official “in the conduct, transaction or performance of any business, transaction, work, duty or function of [the city], or required to be maintained by [the city]” is a public record subject to the Act, regardless of where the record is stored. However, purely personal text messages having absolutely no relation to city business are not subject to production under the Act. Documents described by the city as “transitory communications” should be reviewed for production on a case-by-case basis. Any doubt about whether records should be disclosed should be resolved in favor of disclosure.” *Public Records Opinion No. R-13-023* (paragraph 2.5), Mississippi Ethics Commission (April 11, 2014), [http://www.ethics.state.ms.us/ethics/ethics.nsf/PageSection/A_records_R-13-023/\\$FILE/R-13-023.pdf?OpenElement](http://www.ethics.state.ms.us/ethics/ethics.nsf/PageSection/A_records_R-13-023/$FILE/R-13-023.pdf?OpenElement).

Missouri

The term “public governmental body” is broadly defined in Missouri law. V.A.M.S. 610.010(4). A public record is “any record, whether written or electronically stored, retained by or of any public governmental body including any report, survey, memorandum, or other document or study prepared for the public governmental body by a consultant or other professional service paid for in whole or in part by public funds, including records created or maintained by private contractors under an agreement with a public governmental body or on behalf of a public governmental body....” Mo.Rev.Stat. § 610.010(6).

Following is an excerpt from the *Missouri Media Law Handbook*, Chapter 8, by Joseph E. Martineau, http://www.mobar.org/uploadedfiles/Home/Media_Center/Media_Law_Handbook/chapter8.pdf (citations omitted):

“As a cardinal rule, government records that exist in an electronic medium are subject to inspection and copying in Missouri under principles identical to data in non-electronic format.” See Mo. Rev. Stat. § 109.210(5) (record is defined ‘regardless of physical form or characteristic’); §610.010(6) (‘whether written or electronically stored’); see also *Deaton v. Kidd*, 932 S.W.2d 804, 806 (Mo.App.W.D. 1996) (state statutes maintained on computer constitute a ‘public record’ subject to the Sunshine Law).

“The statutory requirements for retaining e-mail, indeed all government records, are found principally within Missouri’s State and Local Records Law, Mo. Rev. Stat. §§109.200-109.310 (‘Records Law’). The statutory mandate for providing public access to such materials is found primarily within Mo. Rev. Stat. §§610.010 *et seq.*, commonly known as the ‘Sunshine Law.’ While the Records Law deals primarily with retention, and the Sunshine Law with access, each statute to some extent deals with both retention and access.

“The general rules applicable to e-mail and electronic records of governmental bodies can be stated as follows: E-mail and electronic data which pertains to public policy or public business must be retained according to the Records Law and must be produced to requesting members of the public in accordance with the precepts of the Sunshine Law. Further, e-mail and electronic data – which (i) fits within a Sunshine Law request; (ii) exists at the time of the request; and (iii) is not exempt under the Sunshine Law – must be produced in response to a Sunshine Law request, even though such material normally would have been purged or deleted and is not otherwise required to be retained under the Records Law. *Hemeyer v. KRCG-TV*, 6 S.W.3d 880 (Mo. 1999).”

Montana*

Rather than defining which entities are subject to the act, the Public Records Act broadly defines the term “public records” as “the written acts or records of the acts of the sovereign authority, of official bodies and tribunals, and of public officers, legislative, judicial, and executive, whether of this state, of the United States, of a sister state, or of a foreign country, except records that are constitutionally protected from disclosure.”

Nebraska

The public records law in Nebraska states: “Except when any other statute expressly provides that particular information or records shall not be made public, public records shall include all records and documents, regardless of physical form, of or belonging to this state, any county, city, village, political subdivision, or tax-supported district in this state, or any agency, branch, department, board, bureau, commission, council, subunit, or committee of any of the foregoing. Data which is a public record in its original form shall remain a public record when maintained in computer files.” Neb.Rev.St. § 84-712.01(1).

The Nebraska Attorney General has opined that: “Under the definition of public record in § 84-712.01(1) and the Public Records Statutes generally, we believe that e-mails, faxes or records of other electronic communications between elected officials and between elected officials and governmental staff are public records which are subject to disclosure to the general public, unless there is a specific statute in each instance which allows particular electronic materials to be kept confidential.” Neb. Op. Atty. Gen. No. 04007(04).

According to a news report, “Top officials in Gov. Pete Ricketts’ administration have used their personal email accounts for government work — a practice often derided by government watchdogs because it can be a way to keep the emails secret.... However, Ricketts

doesn't appear to be hiding the private emails: After getting a records request from state Democratic Party chairman Vince Powers regarding Moenning, the Ricketts administration released a couple of emails generated on private accounts (although they redacted the private email addresses)..... Using government email accounts automatically subjects the content to the open records law, but using private emails raises the question of whether those private email accounts are subject to public inspection, [one observer said]." Deena Winter, *Governor's staff using personal email for official work*, Nebraska Watchdog (February 11, 2015), <http://watchdog.org/199017/email/>.

Nevada*

The act vaguely covers "all public books and public records of a governmental entity" without defining the terms "public books" or "public records." These terms may therefore be construed to include all that is not specifically exempted by the act, other statutes, or court orders.

The physical format is likely immaterial.

New Hampshire*

The statute covers "governmental records" which means "any information created, accepted, or obtained by, or on behalf of, any public body."

The term "public body" encompasses the following:

The legislature and its committees;

All agencies of the state executive branch (with the exception of the Department of Employment Security);

Commissions, boards, and advisory committees established by public bodies;

Nonprofit corporations performing public services.⁴²⁸

New Jersey

As stated in the New Jersey Open Records Act (NJOA), in N.J.S.A. 47:1A-1.1:

"'Government record' or 'record' means any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been made, maintained or kept on file in the course of his or its **official business** by any officer, commission, agency or authority of the State or of any political subdivision thereof, including subordinate boards thereof, or that has been received in the course of his or its official business by any such officer, commission, agency, or authority of the State or of any political subdivision thereof, including subordinate boards thereof. The terms shall not include inter-agency or intra-agency advisory, consultative, or deliberative material."

NJOA excludes various kinds of records from the definition, ranging from "criminal investigation records" to "pedagogical, scholarly and/or academic research records and/or the specific details of any research project conducted under the auspices of a public higher education institution in New Jersey, including, but not limited to research, development information, testing procedures, or information regarding test participants, related to the development or testing of any pharmaceutical or pharmaceutical delivery system...."

This latter kind of exclusion from public records has attracted interest among academic institutions nationally in light of controversy over access to faculty e-mails, such as at the University of Kansas. See Sara Shepherd, *KU, student, teacher with Koch ties reach settlement*

in case over \$1,800 records request, Lawrence Journal-World (August 27, 2015), <http://www2.ljworld.com/news/2015/aug/27/ku-student-teacher-koch-ties-reach-settlement-case/>.

New Mexico*

The term “public records” is defined as “all documents, papers, letters, books, maps, tapes, photographs, recordings and other materials...used, created, received, maintained or held by or on behalf of any public body and **relate to public business.**”

New York*

The statute broadly covers “any information kept, held, filed, produced, or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever.” The content of the record need not be related to governmental affairs.

North Carolina*

The records covered by the act include “all documents, papers, letters, maps, books, photographs, films, sound recordings, magnetic or other tapes, electronic data-processing records, artifacts, or other documentary material, regardless of physical form or characteristics, made or received pursuant to law or ordinance in connection with the **transaction of public business.**”

This definition has been expanded by the courts to include all records kept by public agencies in the process of performing their public duties. (Emphasis added.)

North Dakota*

The statute broadly covers all “recorded information of any kind, regardless of the physical form or characteristic by which the information is stored, recorded, or reproduced, which is in the possession or custody of a public entity or its agent and which has been received or prepared for use **in connection with public business or contains information relating to public business.**” (Emphasis added.)

Ohio*

The act defines “public record” as any “records kept by any public office, including, but not limited to, state, county, city, village, township, and school district units, and records pertaining to the delivery of educational services by an alternative school in this state kept by the nonprofit or for-profit entity...”

The definition of “public office” is equally broad and encompasses every “entity established by the laws of this state for the exercise of any function of government.

Oklahoma

The state open records law defines records as “all documents, ... regardless of physical form or characteristic, created by, received by, under the authority of, or coming into the custody, control or possession of public officials, public bodies, or their representatives **in connection with the transaction of public business, the expenditure of public funds or the administering of public property.**” 51 Okl.St.Ann. § 24A.3. (Emphasis added.)

According to an Oklahoma newspaper last year: “Several personal email addresses were redacted from the 100 pages of health care-related emails Gov. Mary Fallin's office released last

week, showing she and her staff have used private accounts occasionally to discuss public business.” Cary Aspinwall, *Records show Gov. Mary Fallin using personal email to conduct state business*, Tulsa World (August 6, 2014), http://www.tulsaworld.com/news/government/records-show-gov-mary-fallin-using-personal-email-to-conduct/article_ce7ccd2d-2846-5708-9731-c37cacb8510a.html.

In 2009, the Oklahoma Attorney General opined that: “Electronic communications that qualify as ‘records’ are subject to the Open Records Act and Records Management Act. Moreover, to conclude otherwise would allow public officials and employees to circumvent the open records laws simply by using privately owned personal electronic communication devices to conduct public business.” Okl. A.G. Opin. No. 09-12.

Note: For another account of the Oklahoma law, see the appendix below.

Oregon*

The statute defines public records as “any writing that contains **information relating to the conduct of the public’s business** ...prepared, owned, used or retained by a public body.

All public records are available, regardless of physical format or characteristics. (Emphasis added.)

Pennsylvania*

Local and commonwealth agencies must provide “public records,” while legislative agencies provide “legislative records” and judicial agencies provide “financial records.”

Public records, as defined in Section 102, include all records which are not protected under a privilege or exempt by Section 708 or other state or federal laws.

Section 102 provides a list of 19 types of records which are considered “legislative records,” including financial records, chamber, and other types of reports and manuals.

Financial records, as defined in Section 102, include all accounts, vouchers, or contracts regarding the receipt or expenditure of funds or an agency’s obtainment or use of services, materials, or property. The definition also includes final financial audit reports and the salaries of public officials.

The term “record” encompasses all physical formats of information.

South Carolina*

The act covers “public records” defined as “all books, papers, maps, photographs, cards, tapes, recordings, or other documentary materials regardless of physical form or characteristics prepared, owned, used, in the possession of, or retained by a public body.”

The physical format of the record is irrelevant to its openness.

South Dakota

South Dakota’s open records act, in SDCL § 1-27-1.1, defines the term “public records” as follows:

“Unless any other statute, ordinance, or rule expressly provides that particular information or records may not be made public, public records include all records and documents, regardless of physical form, of or belonging to this state, any county, municipality, political subdivision, or tax-supported district in this state, or any agency, branch, department, board, bureau, commission, council, subunit, or committee of any of the foregoing. Data which is a public record in its original form remains a public record when maintained in any other form.

For the purposes of §§ 1-27-1 to 1-27-1.15, inclusive, a tax-supported district includes any business improvement district created pursuant to chapter 9-55.”

Tennessee

The state open records law defines public records as “all documents, papers, letters, maps, books, photographs, microfilms, electronic data processing files and output, films, sound recordings, or other material, regardless of physical form or characteristics made or received pursuant to law or ordinance or **in connection with the transaction of official business by any governmental agency.**” T. C. A. § 10-7-301 (6). (Emphasis added.)

The Tennessee Coalition for Open Government (TCOG) states: “In Tennessee, the Office of Open Records Counsel has made clear that emails sent by government officials discussing government business, whether sent from a government account or a private account, are subject to the Tennessee Public Records Act.” Deborah Fisher, *Government emails from private accounts – how to comply?*, TCOG (June 30, 2014), <http://tcog.info/government-emails-private-accounts-how-to-comply3007/>.

Texas

The open records law states: “In this chapter, ‘public information’ means information that is written, produced, collected, assembled, or maintained under a law or ordinance or **in connection with the transaction of official business....**” V.T.C.A., Government Code § 552.002(a) Texas further provides: “The definition of “public information” provided by Subsection (a) applies to and includes any electronic communication created, transmitted, received, or maintained on any device if the communication is in connection with the transaction of official business.” V.T.C.A., Government Code § 552.002(a-2). (Emphasis added.)

A Texas newspaper has reported:

“From Capitol Hill to Richardson City Hall, public officials are coming under increased scrutiny for using personal email accounts to conduct public business.

Although it may be handy and convenient, the practice raises concerns about whether private electronic devices are being used to circumvent public disclosure laws.”

“‘It’s becoming more and more prevalent,’ Austin attorney Bill Aleshire said. “As that trend goes up, the trend of disclosure goes down.”

“Texas law requires disclosure of any official communications by email, but many cities don’t have policies that require officials to use municipal email accounts and don’t know the extent to which private emails are being used for public business.”

“It’s a situation that’s ripe for abuse, with the potential for damaging or embarrassing emails, texts or cellphone records to be withheld or deleted before responding to public information requests.”

““Although that’s a criminal offense, ‘it’s going on all the time,’” said Aleshire, an expert in freedom of information law. ‘The delete button has become a great danger to open government.’” Wendy Hundley, *Few cities have policies on use of private email by public officials*, The Dallas Morning News (May 29, 2015), <http://www.dallasnews.com/news/community-news/richardson-lake-highlands/headlines/20150529-few-cities-have-policies-on-use-of-private-email-by-public-officials.ece>.

Utah*

Public records include all materials, regardless of physical format, which are "prepared, owned, received, or retained by a governmental entity or political subdivision.

Vermont*

The act defines public records or documents as "any written or recorded information, regardless of physical form or characteristics, which is produced or acquired in the course of **public agency business.**"

Virginia*

The definition of "public records," also found in Section 2.2-3701, includes all materials, regardless of physical format, "prepared or owned by, or in the possession of a public body or its officers, employees or agents in the **transaction of public business.**" Emphasis added.)

Washington*

The statute defines "public records" as "any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency."

The physical format of the record is irrelevant to its openness.

West Virginia*

The act broadly defines "public records" as "any writing containing information **relating to the conduct of the public's business**, prepared, owned and retained by a public body." ...

The physical format or characteristics of the record is immaterial. (Emphasis added.)

Wisconsin*

The act covers all public records, including "any material ... which has been created or is being kept by an authority."

This broad definition encompasses all physical formats of records and is not limited to only those which public officials are required by law to maintain.

Wyoming*

The act defines "public records" as any materials "that have been made by the state of Wyoming and any counties, municipalities and political subdivisions thereof and by any agencies of the state, counties, municipalities and political subdivisions thereof, or received by them in connection with the **transaction of public business**, except those privileged or confidential by law."

The law covers the executive, legislative, and judicial branches at every level of government. (Emphasis added.)

Appendix

Following are accounts of the Arkansas, Colorado and Oklahoma laws that formed the basis for some committee discussion of alternative ways to define the term "public records." These accounts appeared in a memorandum I prepared September 14, for reference by the committee October 7.

Arkansas Freedom of Information Act, Ark.Code Ann. § 25-19-105(a):

(5)(A) "Public records" means writing, recorded sounds, films, tapes, electronic or computer-based information, or data compilations in any medium required by law to be kept or otherwise kept and that constitute a record of the performance or lack of performance of official functions that are or should be carried out by a public official or employee, a governmental agency, or any other agency wholly or partially supported by public funds or expending public funds. All records maintained in public offices or by public employees within the scope of their employment shall be presumed to be public records.

Note:

In Pulaski County v. Arkansas Democrat-Gazette, 370 Ark. 435 (2007), the Arkansas Supreme Court discussed the definition of public records and how to construe it.

The case arose when a former county official was arrested for allegedly embezzling county funds. A newspaper reporter then requested "all e-mail and other recorded communication" between the former official and others. The official had deleted all of his e-mails, but the county recovered them. In response to the reporter's request, the county released some but not all of the e-mail correspondence, contending that the e-mails not released did not constitute "public records." Id., at 437.

A lower court ruled that the withheld e-mails were public records and ordered that they be released. The county appealed. The Arkansas Supreme Court considered the conditions under which an officials' e-mails may be undisclosable personal information rather than open public records.

The Court said:

"The legislative intent behind the FOIA is stated at Ark.Code Ann. § 25-19-102: 'It is vital in a democratic society that public business be performed in an open and public manner so that the electors shall be advised of the performance of public officials and of the decisions that are reached in public activity and in making public policy. Toward this end, this chapter is adopted, making it possible for them, or their representatives to learn and to report fully the activities of their public officials.'" Id., at 440.

"The presence of the term "performance" in Section 25-19-103(5)(A) may invite a narrower interpretation of "public records." For example, while personal notes made by public officials presumably would be public record under a definition that did not include the "performance" language, the Attorney General has indicated that such notes fall outside Arkansas FOIA. This result is sound, particularly in light of the use of the term "scope of employment" in Section 25-19-103(5)(A). There may be instances, however, in which the personal activities of a public official or employee are inextricably linked to his or her governmental role...." Id.

"[O]nly those documents having a "substantial nexus" with a government agency's activities qualify as public records." Id., at 442, quoting Salt River Pima-Maricopa Indian Community v. Rogers, 168 Ariz. 531, 541 (1991).

"[T]he purpose of the law is to open government activity to public scrutiny, not to disclose information about private citizens." Id., at 443. (Emphasis in the original.)

"Comparing the nature and purpose of a document with an official's or agency's activities to determine whether the required nexus exists necessarily requires a fact-specific inquiry." Id., at 444.

The Court ordered the lower court "to conduct an in camera review to determine if these e-mails 'constitute a record of the performance of official functions that are or should be carried out by a public official or employee' thereby making them 'public records' pursuant to the FOIA." Id., at 446.

Colorado Open Records Act, C.R.S.A. § 24-72-202(6)(a)(I)

"Public records" means and includes all writings made, maintained, or kept by the state, any agency, institution, a nonprofit corporation incorporated pursuant to [a provision of state law], or political subdivision of the state, or that are described in [state law], and held by any local-government-financed entity for use in the exercise of functions required or authorized by law or administrative rule or involving the receipt or expenditure of public funds.

Note:

In 2002, a Colorado board of county commissioners initiated an investigation of allegations of sexual harassment and other misconduct by two officials: the county clerk/recorder and an assistant chief deputy clerk. They purportedly were involved in an extra-marital sexual relationship. An investigator found that 622 messages by the two officials were sent using the county's e-mail and text-pager systems. Sexually explicit and/or romantic content appeared in 570 of the messages. In 2002, the county commissioners released a report about the investigation to the public with redactions. The contents of the sexually explicit messages was omitted from the report.

The news media requested the two officials' e-mails under CORA. The county commissioners, however, declined to disclose the e-mails unless a court found them to be public records. In Denver Publ'g Co. v. Bd. of County Comm'rs, 121 P.3d 190 (Colo. 2005)). The Colorado Supreme Court held that the sexually explicit messages were not public records.

The Court said:

- *An examination of "the content of the message is required to determine if the messages were 'for use in the exercise of functions required or authorized by law or administrative rule or involving the receipt or expenditure of public funds.' The content of the messages must address the performance of public functions or the receipt and expenditure of public funds. Insofar as the messages do not, they remain non-public and outside the scope of CORA." Id., at 199.*

- *"If an elected official sends or receives a message that is in furtherance of, or pertaining to, her duties as an elected official, then it falls within the definition [of public records]. If, however, the communication was sent to or from the elected official in furtherance of some other relationship, it does not fall within the definition. Id., at 200-201.*

- *"It is apparent that a large portion of the e-mail messages... contain only sexually-explicit exchanges between [the two officials]. Based upon the content of the e-mails, it is clear they were sent in furtherance of their personal relationship and were not for use in the performance of the public functions of [their offices]... The only discernable purpose of disclosing the content of these messages is to shed light on the extent of [the two officials'] fluency with sexually-explicit terminology and to satisfy the prurient interests of the press and the public. Id., at 203.*

Oklahoma Public Records Act, 51 Okl.St. Ann. 24A.3

1. "Record" means all documents, including, but not limited to, any book, paper, photograph, microfilm, data files created by or used with computer software, computer tape, disk, record, sound recording, film recording, video record or other material regardless of physical form or characteristic, created by, received by, under the authority of, or coming into the custody, control or possession of public officials, public bodies, or their representatives in connection with the transaction of public business, the expenditure of public funds or the administering of public property.

"Record" does not mean:

- a. computer software,
- b. nongovernment personal effects....

Notes:

A. The term "public body," according to subsection 2 of Oklahoma's open records law, 51 Okl.St. Ann. 24A.3, "shall include, but not be limited to, any office, department, board, bureau, commission, agency, trusteeship, authority, council, committee, trust or any entity created by a trust, county, city, village, town, township, district, school district, fair board, court, executive office, advisory group, task force, study group, or any subdivision thereof, supported in whole or in part by public funds or entrusted with the expenditure of public funds or administering or operating public property, and all committees, or subcommittees thereof. Except for the records required by Section 24A.4 of this title, 'public body' does not mean judges, justices, the Council on Judicial Complaints, the Legislature, or legislators."

B. According to an Oklahoma newspaper last year: "Several personal email addresses were redacted from the 100 pages of health care-related emails Gov. Mary Fallin's office released last week, showing she and her staff have used private accounts occasionally to discuss public business." Cary Aspinwall, Records show Gov. Mary Fallin using personal email to conduct state business, *Tulsa World* (August 6, 2014), http://www.tulsaworld.com/news/government/records-show-gov-mary-fallin-using-personal-email-to-conduct/article_ce7ccd2d-2846-5708-9731-c37cacb8510a.html.

C. In 2009, the Oklahoma Attorney General opined that: "Electronic communications that qualify as 'records' are subject to the Open Records Act and Records Management Act. Moreover, to conclude otherwise would allow public officials and employees to circumvent the open records laws simply by using privately owned personal electronic communication devices to conduct public business." Okl. A.G. Opin. No. 09-12.